Filed 3/28/02

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GEORGE R. JONES, Defendant and Appellant.	B149192 (Super. Ct. No. LA035054-01)
In re GEORGE R. JONES on Habeas Corpus.	B155327

APPEAL from a judgment of the Superior Court of Los Angeles County, John S. Fisher, Judge. Affirmed.

PETITION for Writ of Habeas Corpus. Petition denied.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez,

Supervising Deputy Attorney General, and Laura H. Bak-Boychuk, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant George R. Jones appeals from the judgment entered following a jury trial that resulted in his convictions for second degree robbery, assault with a firearm, and attempted murder. Jones was sentenced to a prison term of 21 years, 4 months.

Jones contends: (1) the trial court erred by refusing to instruct the jury on the defense of unconsciousness; (2) the trial court erred by refusing to instruct on the lesser included offense of attempted voluntary manslaughter; and (3) his counsel was prejudicially ineffective. In his petition for writ of habeas corpus, which we consider concurrently with his appeal, Jones likewise contends his counsel was prejudicially ineffective. Finding his contentions lack merit, we affirm the trial court's judgment and deny Jones's petition for writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Jones pleaded not guilty by reason of insanity, and the sanity and guilt phases of the trial were bifurcated.

a. *Prosecution case.*

During the afternoon of January 22, 2000, Jones entered the Jet Stream Liquor Store in North Hollywood, pointed a gun at store clerk Amer Khazaal, and demanded that Khazaal give him money from the cash register. Khazaal unsuccessfully attempted to

wrest the gun from Jones. Jones stated to Ralph Dvorsky, the only customer present in the store, "I know you pushed the button, you mother fucker." Dvorsky attempted to explain that he did not work at the store and had not pressed any buttons, but Jones pointed the gun at him and pulled the trigger twice. The gun clicked twice but failed to fire. Khazaal gave Jones approximately $1,000 from the cash register. Jones ordered Khazaal to the ground and stated, "I'm coming back." Jones exited the store, entered the driver's side of a white Ford, and drove away. An older woman was seated in the passenger seat of the car. The entire incident was captured by the store's video surveillance camera, and the tape was played for the jury.

Two uniformed police officers arrived at the scene approximately 10 to 20 minutes after Jones's departure. Their black-and-white police cruiser was parked directly in front of the store. While police were talking to the victims, approximately 20 to 40 minutes after the robbery, Jones returned to the scene and calmly walked into the store. He was wearing an employment identification badge.

Khazaal immediately identified Jones as the culprit, and Jones was taken into custody. A gun, containing four expended casings and one live round, was in Jones's waistband. Police discovered the white Ford parked outside the store; it contained over $800 in cash. The female passenger, who was apparently intoxicated, had "passed out" in the vehicle.

At the jail after his arrest, Jones "took a fighting stance" with jail authorities and had to be subdued through the use of force. An officer smelled alcohol on Jones's breath and concluded Jones was intoxicated.

b. *Defense evidence.*

On January 4, 2000, approximately two and one-half weeks prior to commission of the crimes, Jones's wife telephoned police to report that Jones, a Vietnam veteran and former Navy SEAL, was having flashbacks and "wanted to kill anybody that he could." The responding officer found Jones was articulate and appeared to understand his questions. The officer transported Jones to a hospital and placed him on a 72-hour psychiatric hold. After 12 hours Jones began receiving treatment at the Veterans' Administration Hospital on an outpatient basis.

Jones testified in his own behalf. He was a former Navy SEAL and had combat experience in Vietnam and Cambodia. His mission was to rescue downed fliers. He was captured during his tour of duty.

In January 2000, Jones was working as a field electrical engineer for American Instruments; his 1999 salary was $140,000.

Jones was an alcoholic and had begun drinking at the age of 12. While in Vietnam he used heroin and drank alcohol. He continued to use heroin until 1980.

Jones began receiving treatment for psychiatric problems, including chronic depression, bipolar disorder, and anxiety, in 1975. He was hospitalized for a four-month period in 1975 or 1976. In 1984 Jones began suffering from and was diagnosed with

post-traumatic stress disorder and experienced "flashbacks" to his service in Vietnam. He explained that his "mind would be in southeast Asia" and he "would no longer see" his actual surroundings. In 1993, he was committed to a hospital for treatment of alcoholism and psychological problems. At various times, he was prescribed lithium, Prozac, and Neurontin, among other medications.

On January 4, Jones began having flashbacks, and his medication regimen was modified. Approximately five days before the crimes, Jones ran out of his prescribed Neurontin and Paxil because his refill did not arrive in the mail as scheduled. He attempted but was unable to obtain a temporary refill. Jones began drinking and was unable to work.

The evening before the crimes, Jones consumed enough vodka to "get drunk." He drank beer the morning of the incident, drove his wife to work in her white Ford, and then went to visit a friend, Russell.[1] Russell told Jones that he needed money. Jones drove Russell to a liquor store and purchased a beer for Russell and a Dr. Pepper for himself. The duo returned to Russell's residence and Michelle Zeemack, the woman later discovered passed out in the car, arrived. At some point after returning to Russell's residence, Jones "blacked out." The next thing Jones knew, he awoke in a holding cell at the Van Nuys jail. Jones had no recollection of robbing the liquor store or of resisting officers at the jail. At the time of trial, Jones was taking, among other things, Neurontin, Paxil, Klonopin, and Espareidiol for psychiatric problems.

---

1 Russell's last name is not reflected in the record.

c. *Sanity trial.*

Dr. Rose Marie Pitt evaluated Jones. She confirmed that he suffered from bipolar disorder, post-traumatic stress syndrome, anxiety disorder, and alcoholism. Jones had described to Dr. Pitt his history of alcoholic blackouts, including instances in which he had engaged in bizarre activity during such blackout periods. He reported one incident in which he had ridden his motorcycle thousands of miles before he realized what he was doing. Dr. Pitt opined that Jones's experience of flashbacks in January 2000 was a true flashback episode, rather than malingering.

Dr. Pitt confirmed that Jones could have committed the actions depicted in the videotape during an alcoholic blackout. When asked whether blackouts were consistent with Jones's mental illness and alcohol abuse, Dr. Pitt explained, "[n]ot so much his mental illness." However, the use of alcohol combined with anti-anxiety medications, such as the Ativan which Jones had been prescribed at the time of the crimes, could make it more likely that a patient would suffer an alcoholic blackout.

Dr. Pitt explained that a person suffering from an alcoholic blackout could engage in very purposeful behavior, but "for some reason the brain blocks out." An alcoholic blackout was not a sudden loss of consciousness, but was defined as "a loss of memory for specific actions during a specified period of time." Dr. Pitt was unable to answer the question whether, during an alcoholic blackout period, the "rational part" of the actor's mind could function and tell him or her "not to do things." She was unsure what a person in a blackout state could do to prevent behavior carried out during the blackout period.

She opined that, when experiencing an alcoholic blackout, an individual acts consciously and is aware of what he or she is doing, but cannot recall his or her actions later. The behavior of a person acting while unconscious would "not necessarily" be disorganized.

In Dr. Pitt's medical opinion, Jones may have committed the crimes while in a blackout state, but he was sane. Jones's return to the liquor store while the officers were present gave credence to his assertions that he did not remember what he had done. However, Jones's actions during the crimes were well organized and showed he "knew what was going on." The fact Jones was apparently worried about an alarm button being pushed demonstrated he was concerned about being apprehended by police, and therefore knew his conduct was wrong. Dr. Pitt confirmed that a person acting during a blackout could know the nature and quality of their acts.

2. *Procedure.*

Trial on the issue of guilt was by jury. Jones was convicted of second degree robbery (Pen. Code, § 211)[2]; assault with a firearm (§ 245, subd. (a)(2)); and attempted murder (§§ 664, 187, subd. (a)). The jury also found true allegations that Jones personally used a firearm during commission of the crimes (§ 12022.53, subd. (b); 12022.5, subds. (a), (d)). Jones waived jury trial on the sanity issue and the trial court found Jones was sane when he committed the crimes. It also found true the allegation that Jones had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced Jones to a total prison term of 21 years, 4 months.

---

[2] All further undesignated statutory references are to the Penal Code.

DISCUSSION

1. *The trial court did not err by refusing to instruct the jury on the defense of unconsciousness.*

a. *Additional facts.*

Jones requested that the trial court instruct the jury with CALJIC No. 4.30, regarding the defense of unconsciousness. That instruction would have informed the jury that unconsciousness is a complete defense when the defendant committed the crimes while unconscious due to, among other things, the involuntary taking of drugs or involuntary consumption of liquor.[3] The trial court denied Jones's request, finding the instruction inapplicable. It explained that the instruction "applie[d] to people who perform acts while asleep, or while suffering from a delirium, or a fever, or because of an attack of epilepsy, a blow on the head, the involuntary taking of drugs, or the involuntary consumption of liquor," and that no evidence of those circumstances had been presented. In the trial court's view, a mere professed inability to remember the act was insufficient,

---

[3] CALJIC No. 4.30 provides: "A person who while unconscious commits what would otherwise be a criminal act, is not guilty of a crime. [¶] This rule of law applies to persons who are not conscious of acting but who perform acts while asleep or while suffering from a delirium of fever, or because of an attack of [psychomotor] epilepsy, a blow on the head, the involuntary taking of drugs or the involuntary consumption of intoxicating liquor, or any similar cause. [¶] Unconsciousness does not require that a person be incapable of movement. [¶] Evidence has been received which may tend to show that the defendant was unconscious at the time and place of the commission of the alleged crime for which [he] [she] is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was conscious at the time the alleged crime was committed, [he] [she] must be found not guilty."

"in and of itself," to establish the defense, and no medical or other testimony had been presented regarding the cause of Jones's purported unconsciousness or memory lapse.

The trial court did instruct with CALJIC No. 4.21.1, which informed the jury that voluntary intoxication could be considered on the question of Jones's mental state. That instruction stated, "If the evidence shows that a defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether or not the defendant had the required specific intent or mental state."[4]

b. *Discussion.*

"[A] defendant has a constitutional right to have the jury determine every material issue presented by the evidence," (*People v. Lewis* (2001) 25 Cal.4th 610, 645), and a trial court has the duty to instruct accordingly. (*People v. Breverman* (1998) 19 Cal.4th

---

[4] CALJIC No. 4.21.1, as given to the jury, stated: "It is a general rule that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. Thus, in the crime of assault with a firearm as charged in Count 2, or the lesser offense of exhibiting a firearm, the fact that The Defendant was voluntarily intoxicated is not a defense and does not relieve defendant of responsibility for the crime. This rule applies in this case only to the crime of assault with a firearm as charged in Count 2. [¶] However, there is an exception to this general rule, namely where a specific intent is an essential element of the crime. In this – in that event you should consider The Defendant's voluntary intoxication in deciding whether The Defendant possessed the required specific intent at the time of the commission of the alleged crime. Thus, in the crimes of robbery and attempted murder, as charged in Counts 1 and 3, a necessary element is the existence in the mind of The Defendant of a certain specific intent which was included in the definition of those charges earlier in the instructions. [¶] So if the evidence shows that The Defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether or not The Defendant had the required specific intent. If, from all the evidence, you have a reasonable doubt whether The Defendant had that specific intent, you must find that The Defendant did not have that specific intent."

142, 154, 160; *People v. Montoya* (1994) 7 Cal.4th 1027, 1047 ["The trial court is charged with instructing upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case. [Citations.]"]; *People v. Elize* (1999) 71 Cal.App.4th 605, 611-612; *People v. Ratliff* (1986) 41 Cal.3d 675, 694.) A court must instruct on a particular defense at the request of the defendant only when substantial evidence supports such instruction. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944; *People v. Barnett* (1998) 17 Cal.4th 1044, 1145; *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.) Evidence is substantial if a reasonable jury could find it persuasive. (*People v. Barton* (1995) 12 Cal.4th 186, 201 & fn. 8.) In determining whether substantial evidence exists, we do not examine the credibility of the witnesses. (*People v. Tufunga, supra,* at p. 944.) Doubts as to the sufficiency of the evidence to justify the use of a particular instruction should be resolved in favor of the accused. (*Ibid*.)

Unconsciousness, including unconsciousness caused by *involuntary* intoxication, is a complete defense to a charged crime. (§ 26 [unconscious person is incapable of committing crime]; *People v. Ochoa* (1998) 19 Cal.4th 353, 423; *People v. Walker* (1993) 14 Cal.App.4th 1615, 1621; *People v. Velez* (1985) 175 Cal.App.3d 785, 790-791.) On the other hand, unconsciousness caused by *voluntary* intoxication is not a complete defense. Instead, "it can only negate specific intent under section 22." (*People v. Walker, supra,* at p. 1621, citations omitted; § 22; *People v. Velez, supra,* at p. 791.) A person can be unconscious, for purposes of sections 22 and 26, although he or she is

capable of movement. (*People v. Hughes* (2002) 27 Cal.4th 287, 343-344; *People v. Ochoa, supra,* at pp. 423-424 [unconsciousness can exist where the subject physically acts, but is not conscious of acting at the time]; *People v. Froom* (1980) 108 Cal.App.3d 820, 829 ["An unconscious act within the contemplation of Penal Code section 26 is one committed by a person who is not conscious of acting and whose act cannot therefore be deemed volitional, that is, when there is no functioning of the conscious mind. [Citations.]".)

Here, the trial court did not err by declining to instruct with CALJIC No. 4.30, because there was no evidence supporting use of the instruction. Arguably, there was some evidence that Jones was unconscious at the time he committed the crimes. Jones clearly testified he had no memory of the incident; he explained, "I may have physically been there, *but mentally I was not there*." (Italics added.) Jones's own testimony amounted to substantial evidence he was experiencing a blackout. (E.g., *People v. Lewis, supra,* 25 Cal.4th at p. 646 ["The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court to instruct on its own initiative. [Citations.]"]; *People v. Tufunga, supra,* 21 Cal.4th at p. 944 [defendant's own testimony was substantial evidence supporting instruction on claim-of-right defense].) Moreover, Jones's testimony was corroborated by the evidence he returned to the scene shortly after committing the crimes while marked police vehicles and uniformed officers were present, unusual conduct consistent with a memory lapse.

Assuming arguendo, however, that this evidence was sufficient to support a finding of unconsciousness, as opposed to a mere memory lapse, there was no evidence that Jones's blackout was caused by anything other than voluntary intoxication. Jones testified he had been drinking the night before and the morning of the crimes, as well as in the preceding days. An officer testified that Jones appeared to be intoxicated at the jail. Contrary to Jones's argument, there was no evidence suggesting that his blackout was due to causes other than voluntary intoxication. No evidence was presented that his mental illness or use of prescription medications to treat his mental illnesses could result in unconsciousness.

People v. Baker (1954) 42 Cal.2d 550, cited by Jones, is distinguishable. In *Baker*, the evidence suggested that the defendant was intoxicated from a voluntary overdose of prescription drugs, or was suffering from an epileptic attack, including a "clouded state." (*Id.* at p. 575.) Because there was evidence from which the jury could have concluded the defendant acted while unconscious due to either voluntary intoxication or an epileptic seizure, instructions on both the complete defense of unconsciousness and on the effect of voluntary intoxication were proper. (*Id.* at pp. 575-576.) Here, in contrast, there was no evidence presented of any cause for Jones's blackout other than the voluntary consumption of alcohol.

Thus, there was no basis for the court to instruct with CALJIC No. 4.30. Instead, the trial court properly instructed with CALJIC No. 4.21.1, which informed the jury that Jones's voluntary intoxication could be considered in determining whether Jones had the

requisite specific intents on the charged robbery and attempted murder. (*People v. Walker, supra*, 14 Cal.App.4th at pp. 1620-1622 [where evidence showed defendant was voluntarily intoxicated with narcotics at the time of the crimes, trial court properly refused to instruct with CALJIC No. 4.30].)

Jones asserts that his counsel was ineffective for failing to present Dr. Pitt's testimony during the guilt phase, as her testimony would, among other things, have supported use of CALJIC No. 4.30.[5] However, Dr. Pitt's testimony did not suggest Jones's blackout was due to a cause other than voluntary intoxication. Dr. Pitt opined that the use of an anti-anxiety medication such as Ativan, which Jones had been prescribed,[6] *coupled* with alcohol use, could make it more likely a blackout would occur. She did not testify, however, that Jones's mental illnesses or use of prescription medicines, by themselves, would have caused a blackout. For example, when asked whether blackouts were consistent "with [Jones's] history as far as mental illness and alcohol use," Dr. Pitt answered, "*Not so much his mental illness*." During Dr. Pitt's testimony, Jones's blackouts were characterized as "*alcoholic* blackouts." (Italics added.) Moreover, Dr. Pitt opined that an alcoholic blackout was a loss of memory, and that while experiencing a blackout a person acts consciously and is aware of what he or

---

5 We address Jones's related contentions that his counsel was ineffective *infra*.

6 The record is not altogether clear regarding whether Jones was actually taking Ativan at the time of the crimes. He testified that in early January 2000, he was taking a Neurontin/Paxil combination, and was "working on getting Ativan." Dr. Pitt testified that Jones informed her he was taking Ativan near the date of the crimes. We assume arguendo that Jones was taking Ativan on the date of the crimes.

she is doing. Thus, nothing in Dr. Pitt's testimony suggested that Jones's purported unconsciousness was caused by something other than voluntary intoxication. Moreover, Dr. Pitt's testimony suggested Jones had suffered a memory loss rather than an episode during which he acted while unconscious. We find no error.

2. *The trial court did not err by refusing to instruct the jury on the lesser included offense of attempted voluntary manslaughter.*

Jones next contends that the trial court erred by refusing to instruct the jury on the lesser included offense of attempted voluntary manslaughter of Dvorsky. He urges that because Jones "may very well have acted rashly, without thinking, thereby negating malice," the jury should have been instructed on attempted voluntary manslaughter. We disagree.

A trial court has a sua sponte duty to instruct on lesser included offenses when the evidence raises a question regarding whether all the elements of the charged offense were present and the evidence would justify a conviction on the lesser offense. (*People v. Hughes, supra,* 27 Cal.4th at p. 365; *People v. Breverman, supra,* 19 Cal.4th at pp. 148-149.) "On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman, supra,* at p. 162.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense . . . ." (*Ibid.*, orig. italics.)

" 'An offense is necessarily included in another if . . . the greater statutory offense cannot be committed without committing the lesser because all of the elements of the

lesser offense are included in the elements of the greater.' [Citation.]" (*People v. Hughes, supra,* 27 Cal.4th at pp. 365-366.) "Voluntary manslaughter is treated as a lesser included offense of murder. [Citation.]" (*People v. Ochoa, supra,* 19 Cal.4th at p. 422; *People v. Barton, supra*, 12 Cal.4th at p. 200.) Accordingly, the People do not dispute that attempted voluntary manslaughter is a lesser included offense to attempted murder.

" 'An intentional, unlawful homicide is "upon a sudden quarrel or heat of passion" [citation], and is thus voluntary manslaughter [citation], if the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an " 'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than judgment.' " [Citations.] " '[N]o specific type of provocation [is] required . . . .' " [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any " ' " [v]iolent, intense, high-wrought or enthusiastic emotion" ' " [citations] other than revenge . . . .' [Citation.] Absent the heat of passion or a sudden quarrel, voluntary manslaughter is unavailable as a lesser included offense to murder. [Citation.]" (*People v. Ochoa, supra,* 19 Cal.4th at pp. 422-423; *People v. Lasko* (2000) 23 Cal.4th 101, 108.) "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.]" (*People v. Lee* (1999) 20 Cal.4th 47, 59.)

In this case there was no evidence upon which the jury could have found Jones guilty of attempted voluntary manslaughter on a heat of passion or sudden quarrel theory. There was no evidence whatsoever of legally sufficient provocation or a sudden quarrel. Dvorsky did nothing to provoke Jones. Jones initiated the offenses, robbing and assaulting an innocent clerk and store customer. Dvorsky did not provoke Jones but merely explained that he was not an employee and had not pushed an alarm button. There was simply no basis for an attempted voluntary manslaughter instruction.

Jones, however, urges that heat of passion "is a broad term, encompassing a vast array of mental states and emotions." He suggests that language in CALJIC No. 8.44 "makes clear" that a jury "may properly find that '. . . the emotion induced by and accompanying or following an intent to commit a felony . . .' constitutes sufficient heat of passion to reduce attempted murder to attempted voluntary manslaughter." He therefore posits that the jury could have found that "the tenseness and excitement of the situation" caused him to act rashly.

Jones, however, misreads CALJIC No. 8.44 and misconstrues the applicable legal principles. CALJIC No. 8.44 states that the emotion accompanying an intent to commit a felony, in and of itself, does *not* constitute heat of passion. Indeed, if we were to adopt Jones's interpretation, virtually any person who commits or attempts to commit murder would be eligible for attempted voluntary manslaughter, as it seems probable that most, if not all, murderers experience "tens[ion] and excitement," or some other similar emotion, while committing their crimes. Jones cites no other authority for his interpretation of the

law. Instead, as made clear in *People v. Breverman, supra*, 19 Cal.4th at page 163, in order for a homicide to be reduced from murder to voluntary manslaughter, the accused must have acted "as the result of a strong passion *aroused by a 'provocation' "* sufficient to cause an ordinary person to act rashly. (*Ibid.*, italics added.) Tenseness and excitement caused by the defendant's commission of a crime does not, by itself, amount to legally adequate provocation. The trial court did not err by refusing to give an attempted voluntary manslaughter instruction.

3. *Jones's counsel was not prejudicially ineffective.*

a. *Additional facts.*

Prior to trial, doctors Rose Marie Pitt, Kaushal Sharma, and John M. Stalberg examined Jones. The substance of Dr. Pitt's relevant testimony is set forth *supra*. Doctors Stalberg and Sharma wrote letters prior to trial regarding their examinations of Jones; those letters contained the following information. Doctors Stalberg and Sharma examined Jones and reviewed various records, including Jones's medical records from the Veterans' Administration Hospital, police records related to the instant offenses, hospital and police records related to Jones's January 4 "flashback" episode, and records related to Jones's criminal history. Both doctors concluded Jones was not legally insane at the time of the crimes.

Jones had a history of alcohol dependence and had been treated with mood stabilizers and antidepressants at the Veterans' Administration Hospital and continued to receive such medication in jail. Dr. Stalberg stated that Jones had been diagnosed with

anxiety disorder, a history of bipolar disorder, and a history of post-traumatic stress disorder. Dr. Sharma pointed out that "[a]t no time was the defendant given a diagnosis of a psychotic mental condition." Dr. Sharma stated that Jones had had four psychiatric hospitalizations, with the most recent occurring in 1996, for drug and alcohol problems. Dr. Sharma stated that, "For the purpose of this assessment I am willing to accept the fact that the defendant has some mental problems and, irrespective of the diagnosis, this mental problem has created difficulties for him in his life." Both doctors concluded post-traumatic stress disorder was irrelevant to the crimes at issue.[7]

Dr. Stalberg's letter stated, "defendant claims amnesia, which very well may be the case re robbery and attempted murder. . . . [¶] I believe defendant truly does not remember what he did, and therefore one must look at the objective behavior, statements of others, etc. to form opinions on past mental state." Jones's use of a gun "clearly showed he knew the nature and quality of his act, knew it was wrong . . . ." Jones's statement to Dvorsky regarding the alarm button also "suggest[ed] he was aware that what he did was wrong." Furthermore, "[a]lthough intoxicated [Jones] went about the robbery in a goal-directed, problem-solving manner, like any other robber of a liquor store would, aside from discharging his gun in the parking lot prior to the robbery."

---

[7] Dr. Stalberg stated that, "PTSD is not relevant for opinions in this case." Dr. Sharma noted that Jones may have been having a "flashback" during the January 4 episode. However, "his behavior in the January 22nd incident of which he is accused at this time was not a flashback. Flashback by definition is going back to what one has experienced in a traumatic episode and reliving the memory. The defendant was not committing robberies of liquor stores in Cambodia or Vietnam and, therefore, his actions in the instant crime were unrelated to any flashback."

Dr. Stalberg's conclusion was that Jones had "amnesia for the robbery, or a 'blackout.' " The records Dr. Stalberg had reviewed "support a history of chronic alcoholism, drinking at the time of the offense, all supporting my opinion of alcohol induced amnesia, *but this does not mean he could not form any necessary intent or was insane for the crime. In fact, his behavior strongly shows otherwise*." (Italics added.)

Dr. Sharma stated, "I strongly agree with the opinion expressed by Dr. Stalberg." Dr. Sharma explained, "[t]here is overwhelming evidence as demonstrated by the defendant's behavior in the crime that he knew what he was doing. He went to a place where money could be obtained and demanded money from the person he believed would have access to money (the cashier). He even made a comment to a customer regarding pressing a button (apparently referring to an alarm button). He produced a gun to obtain the money and left the scene of the crime. He told his female passenger 'that was easy' while showing her the money.[8] None of that behavior is any different than what would be expected from a person who is trying to commit an illegal act of robbery. The defendant even pulled the trigger twice, however, the gun misfired." Dr. Sharma opined that Jones's action of returning to the scene "may have been 'stupid' but stupidity does not equate [to legal] insanity."

---

8 Both doctors Stalberg and Sharma alluded to this statement. However, evidence of the statement was not adduced at trial.

Jones's appellate counsel filed a declaration in support of Jones's petition for writ of habeas corpus, stating that he had asked Jones's trial counsel why he failed to present the testimony of doctors Pitt, Sharma, and Stalberg, but trial counsel failed to respond.

b. *Discussion.*

Jones asserts that his counsel was prejudicially ineffective. He argues that counsel should have called doctors Pitt, Sharma, and Stalberg as witnesses during the guilt phase of the proceedings, because their testimony would "surely . . . have been a successful defense" and their evidence was "dispositive." These contentions lack merit.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) We presume that counsel's conduct " 'falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citations.] Were it otherwise, appellate courts would be required to engage in the

‘ “perilous process” ’ of second-guessing counsel’s trial strategy. [Citation.]” (*People v. Frye* (1998) 18 Cal.4th 894, 979.)

Initially, we reject Jones’s contention that defense counsel’s comments indicated he failed to call the doctors because he had not properly investigated the case. To the contrary, defense counsel’s statements at the motion for new trial suggest that he *did* make a tactical decision regarding whether to present the testimony of the doctors during the guilt phase of the trial. He stated: “One of the decisions I had to make in trying the case, since the original plan was to try part of the case to the jury as [to] guilt, and part of it as to the [issue of insanity], was at what point to bring in the medical testimony. [¶] As it turns out, I think had Dr. Pitt testified to her conclusions that this was a genuine blackout situation, and a person’s – whether or not a person can control their actions during a blackout, I think that would have helped the jury in the question of intent.” These comments suggest defense counsel made a tactical decision which, in hindsight, he regretted.

In any event, we conclude that defense counsel clearly could have made a reasonable tactical choice not to call doctors Sharma and Stalberg, and not to call Dr. Pitt during the guilt phase of the trial. Jones overstates the favorable aspects of the doctors’ findings and ignores the portions of their letters and testimony that would have negatively affected his defense. Dr. Stalberg, for example, concluded that Jones was suffering from alcohol-induced amnesia, but stated “this does not mean he could not form any necessary intent or was insane for the crime. In fact, his behavior strongly shows otherwise.”

Dr. Sharma's testimony would have been even less favorable, as he did not unequivocally accept that Jones suffered from the mental illnesses described and pointed out that Jones had never been diagnosed with a psychotic mental condition. Dr. Sharma "strongly agree[d]" with Dr. Stalberg and opined, "[t]here is overwhelming evidence as demonstrated by the defendant's behavior in the crime *that he knew what he was doing*."

Defense counsel likewise could have made a legitimate tactical decision not to call Dr. Pitt during the guilt phase of the trial. As we have outlined *supra,* Dr. Pitt did *not* testify that Jones was acting unconsciously when he committed the crimes. She described a blackout as a memory loss, not a loss of consciousness. Dr. Pitt was asked, "Now, when you're in an alcoholic blackout, can you control – can you, your rational part of your mind, tell you not to do things?" She responded that the question was difficult to answer, but stated, "frankly, I don't see why your rational mind couldn't prevent you from doing something while in that blackout state," although persons in a blackout state were usually very disinhibited. Dr. Pitt, like doctors Stalberg and Sharma, viewed Jones's well-organized actions during the crime showed he "knew what was going on." Dr. Pitt, like doctors Sharma and Stalberg, opined that Jones's post-traumatic stress disorder did not have "anything to do with this particular case," conclusions that defense counsel might well have considered damaging to Jones's defense.

Thus, while Dr. Stalberg's, Dr. Pitt's, and to a lesser extent Dr. Sharma's testimonies would have supported Jones's claim that he had a history of mental illness and could not remember the crime, neither of these facts would have significantly

contributed to Jones's defense. The mere fact Jones could not recall the crime did not establish that he was unconscious or lacked the requisite specific intents. To the contrary, the doctors' opinions suggested the opposite – that Jones, while unable to recall the events, acted purposefully and knew what he was doing.

Defense counsel very prudently might have wished to avoid introducing such testimony, especially in light of the fact that the jury already had before it powerful evidence that Jones had, in fact, experienced a blackout, in that he returned to the crime scene, wearing an employee identification badge, while uniformed police and their marked police car were present. One officer testified that he was surprised when Jones entered the store after the robbery, and that in over 28 years of experience as a police officer, nothing similar had ever occurred while he was investigating a robbery. Likewise, Jones's own testimony that he suffered from psychiatric problems was corroborated by the undisputed evidence that he had been placed on a psychiatric hold shortly before the crimes. In sum, while the doctors' opinions included some material favorable to the defense (the facts that Jones probably had an alcoholic blackout, i.e., memory loss, took psychiatric medications, and had been diagnosed with various mental disorders), they also included some aspects that defense counsel legitimately could have viewed as negative. Thus, defense counsel could reasonably have concluded that presentation of the doctors' testimony at the guilt phase would have done more harm than good. Jones's ineffective assistance of counsel claim therefore lacks merit.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P.J.

KITCHING, J.